UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RICHARD EWERS,	:	
	:	
v.	:	Civil No. 3:03CV104(AHN)
	:	
	:	
IMMIGRATION & NATURALIZATION SERVICE,	:	

RULING ON HABEAS PETITION

Petitioner Richard Ewers ("Ewers") has filed the instant habeas petition claiming that he acquired United States citizenship derivatively by reason of his mother's naturalization and therefore the Immigration and Naturalization Service ("INS") cannot remove him from the United States. For the reasons set forth below, Ewers claims are jurisdictionally barred, and in any event, his citizenship claim is unavailing.

Factual Background

Ewers, a native of Jamaica, entered the United States on January 31, 1994, as a non-immigrant visitor. On October 5, 1995, Ewers was adopted by Norma Wellington. One year prior to his adoption, on April 11, 1994, Norma Wellington became a naturalized United States citizen. On June 27, 1996, Ewers's status was adjusted to a lawful permanent resident. On March 16, 2001, Ewers was convicted in Connecticut Superior Court in Hartford, Connecticut for the offense of robbery in the third degree in violation of Conn. Gen.

Stat. § 53a-1361 for which he was sentenced to three years' incarceration.

On or about November 4, 2002, the INS instituted removal proceedings against Ewers by filing a Notice to Appear. Ewers was charged with deportability pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. § 1251(a)(2)(A)(iii) (Supp. IV 1998), as an alien convicted of an aggravated felony, as the term is defined in Section 101(a)(43)(G) of the Act. See 8 U.S.C. § 1101(a)(43)(G) (Supp. IV 1998) (defining aggravated felony to include theft offenses for which the term of imprisonment is at least one year).

It is not clear from the papers submitted by the parties whether Ewers raised his citizenship claim during his proceedings before the immigration judge ("IJ"). Nevertheless, by order dated November 22, 2002, the IJ ordered Ewers removed to his native Jamaica.

Ewers affirmatively waived his right to appeal and thus did not file an appeal with the Board of Immigration Appeals ("BIA"). Subsequently, Ewers filed this habeas petition seeking to stay his removal to Jamaica. He claims that he has derived United States citizenship. On January 23, 2003, this Court entered a temporary stay of the removal.

DISCUSSION

A. Subject Matter Jurisdiction

If Ewers had raised his citizenship claim before the IJ and timely appealed the IJ's ruling to the BIA, Ewers's avenue for judicial review of his citizenship claim would have been by direct petition for review, filed within 30 days of the BIA's decision, to the United States Court of Appeals for the Second Circuit. See 8 U.S.C. § 1252(b)(1) (Supp. IV 1998); see generally id. § 1252(a)(1) (Supp. IV 1998) (judicial review of final orders "is governed only" by the Hobbs Act, 28 U.S.C. § 2341 et seq., i.e., direct petition to courts of appeals).

Specifically, Section 242(b)(5) (similar predecessor provision applicable to judicial review of pre-April 1, 1997, initiated deportation proceedings) of the Act provides for the consideration of citizenship claims in the courts of appeals:

> If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

8 U.S.C. § 1252(b)(5) (Supp. IV 1998); accord id. § 1105a(a)(5) (1994).

A circuit court must pass on the citizenship claim of an alien seeking review of a final order unless an issue of material fact is presented, in which case the circuit court can remand to the district court for factual finding. See Agosto v. INS, 436 U.S. 748, 751

(1978); see also McConney v. INS, 429 F.2d 626, 627 (2d Cir. 1970) (citizenship claim transferred to district court for de novo hearing); Tanaka v. INS, 346 F.2d 438, 439 (2d Cir. 1965) (refusing to transfer action to district court for resolution of citizenship claim).

An alien can not bring his citizenship claim to a district court in the first instance. See Alexander v. INS, 74 F.3d 367, 369 (1st Cir. 1996) ("Once a genuine material issue of fact is posed, the statute entitles [petitioner] to a trial de novo in the district court.") (citing former 8 U.S.C. § 1105a(a)(5)) (emphasis added).

Alternatively, Ewers could, at any time, file an Application for Certificate of Citizenship application on a Form N-600 ("N-600") with the INS seeking a determination of his citizenship claim.[1] Congress has delegated the authority to determine derivative citizenship in the first instance to the Attorney General. See 8 U.S.C. 1452(a) (Supp. IV. 1998). Accordingly, a person residing in the United States or abroad may apply for a declaration of citizenship by submitting an N-600, together with related documentation, to the appropriate INS district office or sub-office. See 8 C.F.R. § 341.1 (2000); 8 U.S.C. § 1452(a) (2000). If the application is denied, the applicant may appeal to the INS's

[1] At oral argument, Ewers's attorney admitted that he could file such an application with the INS but has not done so.

Administrative Appeals Unit (the "AAU"). See 8 C.F.R. § 103.3(a)(2000). In certain circumstances, an applicant whose appeal is denied by the AAU is entitled to further review. See, e.g., 8 U.S.C. § 1503(b) (application for certificate of identity to diplomatic or consular officer by persons not in United States); § 1503(a) (declaratory judgment action by persons within United States) (2000). An alien is entitled to apply for a certificate of citizenship regardless of a final removal order. See Alexander v. INS, No. Civ. 96-147, 1997 WL 97114, at *1, n.2 (D. Me. Feb. 27, 1997) (noting that administrative proceedings involved in an application for a certificate of citizenship are "separate and distinct" from deportation proceedings).

Under either scenario -- raising the citizenship claim in removal proceedings or filing an N-600 application with the INS for a declaration of citizenship -- the INA requires that all available administrative remedies be exhausted before seeking judicial review. See 8 U.S.C. § 1252(d) (Supp. IV 1998) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as a right."). This exhaustion requirement constitutes a "clear jurisdictional bar, and admits of no exceptions." Mejia-Ruiz v. INS, 51 F.3d 358, 362 (2d Cir. 1995) (quoting Roldan v. Racette, 984 F.2d 85, 90 (2d Cir. 1993)); see also Bastek v. Fed. Crop Ins., 145 F.3d 90, 94 (2d Cir.

1998) (holding that "statutory exhaustion requirements are mandatory, and courts are not free to dispense with them").

Moreover, courts have repeatedly determined that aliens cannot bypass established administrative procedures and seek declaratory relief in this court. See e.g., Duran v. Reno, No. 97 Civ. 3156 (DLC), 1998 WL 54611, at *3 (S.D.N.Y. Feb. 10, 1998) (holding that district court lacked jurisdiction where alien sought declaratory relief claiming citizenship because Second Circuit is sole forum for review); Martinez v. United States, No. CV-89-581 (RJD), 1991 WL 41788, at *1 (E.D.N.Y. Mar. 11, 1991) (refusing to enjoin deportation proceedings or to order INS to issue certificate of citizenship, and noting that district court lacks subject matter jurisdiction because Second Circuit is sole forum for review under 8 U.S.C. § 1105a(a)(5)); Clemons v. INS, 822 F. Supp. 681, 682 (D. Colo. 1993) (holding that district court was prevented from determining alien's nationality claim where deportation proceedings were in progress and alien's defense to deportation was citizenship claim), aff'd mem., 16 F.3d 415 (10th Cir. 1994) (table); Garcia-Sarquiz v. Saxbe, 407 F. Supp. 789, 791-92 (S.D. Fla. 1974) (holding alien's declaratory judgment action concerning his citizenship claim was precluded, where alien was ordered deported after his citizenship claim was rejected by IJ), aff'd, 527 F.2d 1389 (5th Cir. 1976).

Thus, Ewers cannot now deliberately bypass the required review

procedures and collaterally challenge his removal order through a habeas corpus petition. Accordingly, Ewers's habeas petition is dismissed for lack of jurisdiction.

2. Ewers's Citizenship Claim

Even assuming arguendo that jurisdiction were proper in this court, Ewers's claim of derivative citizenship is without merit. Ewers claims that he derived citizenship under former Section 8 U.S.C. § 1431-1432 (1995). Ewers's reliance on Section 1432(a)(5) to establish derivative citizenship is misplaced. Section 1432(a) provides:

> (a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
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> (1) The naturalization of both parents; or
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> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there as been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
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> (4) such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subjection, or thereafter begins to reside permanently in the United States while

under the age of eighteen years.

(b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent or parents, in the custody of his adoptive parent or parents, pursuant to a lawful admission for permanent residence.

Section 321(a)(5) of the Act, 8 U.S.C. 1432 (1995).

Section 1431(a)1-5 applies to birth parents. Section 1431(b) applies to adopted children. Under Section 1431(b), Ewers could only obtain derivative citizenship, if he was: (1) residing in the United States; (2) pursuant to lawful permanent residence; (3) in the custody of his adopted mother. All three conditions must be satisfied at the time of the mother's naturalization. Although Ewers was residing in the United States at the time of his mother's naturalization,[2] he was not residing here as a lawful permanent resident nor was he in his mother's legal custody at the time of her naturalization.[3] Consequently, Ewers could not have derived U.S. citizenship through his adopted mother's naturalization. For these

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[2] In his reply papers, Ewers claims that he came to the United States as an orphan. This is completely unsupported by the record. By his own admission, Ewers entered the United States as a visitor.

[3] In this case because Ewers was adopted, Ms. Wellington acquired legal custody on the date of the adoption. See generally, Matter of Dela Rosa, 14 I & N. Dec. 728, 729, 1974 WL 30178 (BIA 1974) ("'legal custody' may vest by virtue of either a natural right or a court decree").

reasons, Ewers claim must fail.[4]

CONCLUSION

For the foregoing reasons, Ewers's petition for a writ of habeas corpus is hereby DISMISSED and the STAY of removal is VACATED. The clerk is directed to CLOSE this case.

SO ORDERED this day of February, 2003 at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge

[4] The court notes that if Ewers's mother had petitioned for a certificate of citizenship after she adopted him under Section 322 of the Act, or if Ewers had himself petitioned for citizenship after his eighteenth birthday, he could have obtained United States citizenship.